

STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. 98 B 100

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

RICHARD NAVARRO,

Complainant,

v.

DEPARTMENT OF LABOR AND EMPLOYMENT,
OFFICE OF UNEMPLOYMENT INSURANCE,

Respondent.

THIS MATTER was heard in evidentiary hearing before Administrative Law Judge Michael Gallegos on April 6, 1998 at 1525 Sherman Street, B-65, Denver, CO. Respondent was represented by Assistant Attorney General Laurie Rottersman. Complainant appeared *pro se*.

MATTER APPEALED

Complainant appeals a disciplinary termination. For the reasons set forth below, Respondent's actions are affirmed.

PRELIMINARY MATTERS

1. Exhibits

a. Judicial Notice was taken of Complainant's completed Colorado State Personnel Appeal Form, marked as Complainant's Exhibit B.

b. Documents marked as Complainant's Exhibits A and C through F were not offered into evidence and therefore were not accepted into evidence.

c. Documents marked as Respondent's Exhibits 1 through 5, 13 through 16, 21, 25, 29 and 39 through 41 were not offered into evidence and therefore were not accepted into evidence.

d. The parties stipulated to the acceptance into evidence of Respondent's Exhibits 10, 18, 24 and 33. Respondent's Exhibits 10, 18, 24 and 33 are Complainant's Pace Evaluations.

e. Respondent's Exhibits 7, 9, 17, 19, 20, 27, 28, 30, 31, 32, 35, 36, 37, 38 and 42 were accepted into evidence without objection.

f. Complainant's Exhibits G through J were accepted into evidence without objection.

g. Respondent's Exhibits 6, 8, 22, 23, 26 and 33.a were accepted into evidence, over objection, as "Training Notes" and/or Records of Regularly Conducted Activity more commonly referred to as "Business records", under Colorado Rules of Evidence, Rule 803 (6).

h. Respondent's Exhibit 34, Complainant's December 1997 PACE Evaluation was accepted into evidence, over objection, as Records of Regularly Conducted Activity more commonly referred to as "Business records", under Colorado Rules of Evidence, Rule 803 (6).

i. Respondent's Exhibit 11 was accepted in part as offered. It is a letter dated June 21, 1996 that formally advises Complainant of a Corrective Action. The Exhibit was limited to only those documents originally enclosed with the letter. Therefore the letter and the following twenty-two (22) pages and no more make up Exhibit 11.

j. Respondent's Exhibit 26.a Complainant's federal QPI evaluation was accepted into evidence, over objection, as Records of Regularly Conducted Activity more commonly referred to as "Business records", under Colorado Rules of Evidence, Rule 803 (6).

2. Witnesses

a. Respondent called the following witnesses: Ms. Stephanie Kanka, a Labor and Employment Specialist IV and Complainant's supervisor; Ms. Diane Thompson, Complainant's Co-supervisor since February, 1996; Mr. Donald Peitersen, Director of Unemployment Insurance and Complainant's appointing authority.

b. Complainant testified on his own behalf.

ISSUES

1. Whether Complainant engaged in the actions for which discipline was imposed;
2. Whether Respondent's action, a disciplinary termination, was arbitrary or capricious;
3. Whether Respondent's action was contrary to rule or law, including State Personnel Board Rule R8-3-1 regarding progressive discipline;

4. Whether Complainant is entitled to costs and fees.

FACTS

1. Complainant was hired in 1993 as a Spanish-speaking Customer Service Representative (CSR) for the Colorado Office of Unemployment Insurance. His duties included taking calls as they came in and processing claims both in English and in Spanish.

2. Complainant is bi-lingual, i.e. he speaks and understands both English and Spanish.

3. At the time he was hired, Complainant was one of approximately 100 (One Hundred) CSRs who worked independently, by telephone, serving customers.

4. Customer Service Representatives hired in a group went through a one (1) week group-training which covered how to take calls and process claims.

5. Complainant was not hired as part of a group and therefore did not attend a training session. He received on-the-job training from other CSRs over a thirty (30) day period.

6. A separate group of employees within the Office of Unemployment Insurance, “Adjudicators” handled entitlement decisions. There was no opportunity for CSRs to learn adjudication.

7. A third group of employees handled “Special Claims”, e.g. federal, multi-state or ex-military claims.

8. Complainant asked to be removed from classification as a Spanish-speaking CSR because of his difficulty in understanding some dialects of Spanish. He continued to take claims in English and to cover the phones for the Spanish-speaking CSRs when they took breaks or as needed.

9. In February of 1996 the Office of Unemployment Insurance was organized into “teams”. Each team member, regardless of prior duties, was expected to take calls and process claims, make entitlement decisions and handle special claims, i.e. each would have to learn how to act as a CSR, as an adjudicator and how to process special claims.

10. Complainant was made part of Team # 1. Initially Complainant’s duties remained the same. However as the team concept was put into effect, it became clear to Complainant’s supervisor that Complainant was “lacking in basic knowledge” to be able to act as a competent team member. He didn’t take federal (special) claims and he had no knowledge of adjudication at all.

11. As a result of the reorganization Complainant’s position was upgraded from an L & E I (Labor and Employment Specialist I) to an L & E II (Labor and Employment Specialist II). (Respondent’s

Exhibit 42.)

12. Complainant appeared “overwhelmed” by the team concept.

13. The team attitude was “there is nothing that can’t be corrected”.

14. Beginning in April of 1996, Complainant’s supervisor, Ms. Kanka began to meet with Complainant every one (1) or two (2) weeks to review his progress in learning the new areas of adjudication and special claims. Through these meetings she identified areas in which Complainant needed training. (Respondent’s Exhibits 6, 7 and 19.)

15. Complainant began training under Ms. Diane Kostecki in April, 1996. Ms. Kostecki sat with Complainant, 4 hours per day/ 5 days per week, i.e. approximately one-half (1/2) time, for six (6) weeks. During the six-week training period, Ms. Kostecki concentrated on claims intake. The rest of the team covered for Ms. Kostecki while she trained Complainant.

16. After six weeks Ms. Kostecki continued one-on-one training by gradually introducing Complainant to the adjudication process.

17. In order for Complainant to learn how to handle special claims, the team decided each of the other team members would transfer their special claims calls to Complainant’s phone then take the claim there so Complainant could listen and learn.

18. In May of 1996 Complainant mishandled a claim. He incorrectly directed a claimant to file unnecessary documentation, a one (1) to five (5) page narration, before the claim could be processed. Complainant’s actions caused an unnecessary delay in payment of the claim. (Exhibit 9, pg.1 only).

19. Complainant was reluctant to take claims until a form SF8 or SF50 was received. Forms SF8 and SF50 were *not* required in order to take a claim and the set procedure was to *not* wait for either of the forms.

20. In spite of the one-on-one, half-time training, Complainant continued to misidentify issues when taking claims in June, 1996. (Respondent’s Exhibit 11.)

21. Complainant took fewer claims than his teammates. Between January 1996 and June 1996 the average UCFE claims taken per person was six (6). During that same time period, Complainant took one (1) claim. (Respondent’s Exhibit 11.)

22. By mid-June 1996, it appeared to Complainant’s supervisors and teammates alike that Complainant still did not understand adjudication. (Respondent’s Exhibit 11.)

23. Complete training for adjudication may take up to six (6) months.

24. In June, 1996 Complainant mishandled the claim of Ms. Rufina San Diego. He made no record of taking the initial call. When Complainant was questioned regarding the claim, he stated he was waiting for an SF50 form which was an unnecessary form. (Respondent's Exhibit 11.)
25. Ms. Kanka considered a Corrective Action but instead Complainant was directed to immediately call the claimant and take the claim without waiting for the unnecessary form. (Respondent's Exhibit 11.)
26. Complainant did not make contact with the claimant. (Respondent's Exhibit 11.)
27. Three days later Complainant was again directed to contact the claimant and take her claim. (Respondent's Exhibit 11.)
28. Complainant failed to contact the claimant and take the claim. Another teammate had to call the claimant, take the claim and back date it. (Respondent's Exhibit 11.)
29. Complainant's actions caused an unnecessary delay in payment of the claim.
30. For his failure to take the San Diego claim, his "refusal" to learn adjudication and his continued misidentification of issues, Complainant was issued a Corrective Action. (Respondent's Exhibit 11. and 12.)
31. Ms. Kanka also decided to complete *individual* PACE evaluations on Complainant rather than include him in the team evaluations because it was clear to her that, in spite of the additional training, Complainant was still not able to competently handle claims or adjudications. She did not want his continued inadequacies to effect the team rating. (Respondent's Exhibit 11.)
32. Complainant filed a grievance challenging the Corrective Action. (Respondent's Exhibit 17.)
33. The Corrective Action was upheld. (Respondent's Exhibit 20.)
34. Complainant continued to blame "lack of training" for his lack of progress in handling claims and adjudications.
35. In August, 1996 Complainant's supervisor received a complaint that Complainant had been rude on the phone. Complainant denied the incident.
36. In August, 1996 Complainant was still having problems with A & A's (Able and Available adjudications) but his individual PACE Evaluations were "Good". (Respondent's Exhibits 10, 18 and 24.)
37. At the end of September, 1996 the Corrective Action was removed from Complainant's file based on his "Good" evaluations, some progress in training and in order to improve his attitude.

38. In January, 1997 Complainant's performance was evaluated using a federal "QPI" form (Exhibit 26.a). The form indicates that out of nine (9) decisions evaluated, only four (4) were supported by documentation which is a "failing" evaluation; Complainant did not ask enough questions when taking claims, in spite of the fact that he had a manual with the questions he should ask listed for him; Complainant did not address "A & A" (adjudication) issues and in one case used the "wrong canned statement".

39. A failing evaluation, i.e. failure to meet federal standards for the taking of unemployment claims could result in the loss of federal funds to Respondent, the Colorado Department of Labor and Employment.

40. In February, 1997 Complainant mishandled a claim by deducting a week's annual leave from the claim instead of one (1) day. When questioned about it, Complainant stated that he did not know how to calculate one day's annual leave so he deducted a week's annual leave from the claim payment. (Respondent's Exhibit 26.)

41. Complainant was ordered to recalculate the amount due the claimant and claimant was issued a check.

42. Complainant's actions caused an unnecessary delay in the payment of the claim.

43. In February, 1997 Complainant mishandled a federal claim by failing to ask many basic questions. The claim could have been and therefore should have been resolved the same day the initial call came in. Another teammate had to take the information and resolve the claim. Complainant's actions caused a delay in the processing of this claim.

44. In February, 1997 Complainant was ordered to correct a claim which he had taken. Complainant failed to do so. Five days later he was again ordered to correct the claim. When questioned about the delay he stated that the paperwork had gotten mixed in with other documentation and he "didn't see it". Complainant's actions caused a delay in the processing of the claim. (Respondent's Exhibit 28.)

45. In June, 1997 Complainant processed a claim without complete information. The claimant tried to give the complete information to Complainant but he insisted that he did not need it. Complainant's actions with regard to this claim would fail federal standards, (Respondent's Exhibit 30), which could occasion the loss of federal funds to the Colorado Department of Labor and Employment.

46. In June, 1997 Ms. Kanka reviewed Complainant's intake calls by listening to the audio-taped recordings of the calls. She found that most calls lacked completeness and five (5) calls were "totally unacceptable". When questioned about the calls Complainant again claimed "lack of training" or being incorrectly trained. At this point Complainant had been in training for more than a year. Ms. Kanka began to question Complainant's sincerity and integrity regarding his abilities and the need for further training. Ms. Kanka recommended a Corrective Action based on her investigation into the phone claims mishandled by Complainant. (Respondent's Exhibit 31.)

47. A Corrective Action was issued to Complainant in June, 1997.
48. Ms. Kanka continued Complainant's training in special claims.
49. In September, 1997 Complainant received a "Needs Improvement" rating on his PACE evaluation which was later upgraded to "Good" based his discussions with Ms. Kanka.
50. In December, 1997 Complainant received a "Needs Improvement" rating on his PACE evaluation indicating that he was still not meeting federal standards; he was still not asking enough or the right questions during intake calls; three claims were either not resolved or resolved incorrectly; his work was substandard and his teammates were complaining about his work. Additionally, "the incorrect information Rich has given out and the mistakes he has made could have been avoided if he had used the manuals and other training materials that have been provided to all L & E's." (Labor and Employment specialists such as Complainant), (Respondent's Exhibits 34 and 37).
51. An R833 meeting was scheduled at the request of Ms. Kanka's supervisor, Mr. Mike Cullen. (Respondent's Exhibits 35 and 36.)
52. Mr. Donald Peitersen is the proper appointing authority in this matter. He has been with the Department of Labor and Employment for 25 (twenty-five) years.
53. Complainant, his AFSME (union) representative, Ms. Kanka and the appointing authority were present at the R833 meeting.
54. In making his decision Mr. Peitersen considered both the verbal and written reports from Mr. Cullen and Ms. Kanka; Complainant's work history including unresolved performance issues, prior corrective actions, the number of directives Complainant received regarding specific cases; Complainant's "unparalleled amount of training"; Complainant's improvement in some areas; Complainant's comments and attitude; and alternative forms of discipline including demotion.
55. Demotion was not a reasonable option in this matter because Complainant's duties would have remained the same.
56. Continued training would put an undue strain on Complainant's teammates.
57. Complainant was given more training than any other employee in the department.
58. Complainant was properly notified regarding his disciplinary termination.

DISCUSSION

The burden is upon Respondent to prove by a preponderance of the evidence that the acts on which the discipline was based occurred and that just cause warrants the discipline imposed. *Department of Institutions v. Kinchen*, 886 P. 2d 700 (Colo. 1994). The administrative law judge, as the trier of fact, must determine whether the burden of proof has been met. *Metro Moving and Storage Co. v. Gussert*, 914 P. 2d 411 (Colo. App. 1995).

Respondent argues that it met its burden both with regard to 1.) whether or not the act occurred and 2.) whether just cause warrants the discipline imposed. There is little dispute as to whether or not the act(s) occurred. Respondent presents significant documentation and Complainant admits that the mistakes occurred. Therefore, the only remaining question is whether just cause warrants the discipline imposed.

In this case Complainant did not receive adequate training when he began as a Customer Service Representative (CSR) with the single duty of taking claims over the telephone. He attempted to address his difficulties by requesting that he be relieved of taking claims in Spanish. When the team concept was instituted, he expressed his concerns regarding his ability to accomplish adjudication or take special claims. The team and his supervisors agreed to support his training, although it soon became clear that he needed training in taking even the most basic claims.

The team and Complainant's supervisors went to extreme lengths to insure his success. Over a six week period, fully half of his work day was spent in training to take basic claims. His teammates absorbed extra work so Complainant could receive training to accomplish tasks he had been performing for the last three years. Adjudication was gradually introduced. His teammates pitched in to help train him to take special claims. He was given more than a year to learn how to accomplish all the necessary tasks.

Nonetheless, Complainant continued to misidentify issues because he failed to ask questions that were written for him in manuals and other materials available at his work station. He failed to get enough information, when taking a call, necessitating teammates to go back and correct or file claims. Claimants waited unnecessarily for payment on their claims because he resisted the directions of his trainer. He resisted instruction in adjudication and failed to follow directives with regard to specific claims. After more than a year of such actions, Complainant's teammates and supervisors began to question Complainant's commitment to training and his commitment to carrying his share of the workload; perhaps it soured their perceptions regarding team concepts generally. Complainant continued to blame "lack of training" for his mistakes.

Complainant's supervisors followed concepts of progressive discipline. Wherever possible, rather than issue a Corrective Action, they gave a verbal directive. In those situations Complainant had to be told more than once to complete the claim and yet failed to do so. Where Corrective Actions were issued, Complainant continued to receive training and had the resource materials available to him but still made the same mistakes.

The only reasonable conclusion was that Complainant would continue to make the same mistakes and continue to blame lack of training or inadequate training, instead of his own lack of motivation. The appointing authority considered this and considered the progress that Complainant had made in taking claims. He reasonably determined that little progress if any would be gained from further training. Complainant's lack of motivation was a drain on Respondent's resources and Complainant's failure to follow direct orders required discipline.

Any discipline that left Complainant taking claims and imposing on the time and energy of his teammates would be a disservice to both. Complainant had received more training than anyone in recent history at the department. If Complainant could not follow the questions written for him or follow a direct order from his supervisor, then he could not function as a member of the team. He was given significant and many opportunities to train and improve but he chose to blame "lack of training" rather than to properly follow the claim-taking patterns laid out for him.

CONCLUSIONS OF LAW

1. Complainant committed the acts for which he was disciplined.
2. Respondent's actions were within the range of reasonable alternatives available, i.e. Respondent's actions were not arbitrary or capricious
3. Respondent's actions followed a progressive discipline pattern and were not contrary to rule or law.
4. Complainant is not entitled to costs or fees.

ORDER

The disciplinary termination of **Respondent is affirmed.**

Dated this 26th
day of May 1998
at Denver, CO

Michael Gallegos
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), 10A C.R.S. (1993 Cum. Supp.). Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), 10A C.R.S. (1988 Repl. Vol.); Rule R10-10-1 et seq., 4 Code of Colo. Reg. 801-1. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is **\$50.00** (exclusive of any transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record should contact the State Personnel Board office at 866-3244 for information and assistance. To be certified as part of the record on appeal, an original transcript must be prepared by a disinterested recognized transcriber and filed with the Board within 45 days of the date of the notice of appeal.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double spaced and on 8 ½ inch by 11 inch paper only. Rule R10-10-5, 4 CCR 801-1.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R10-10-6, 4 CCR 801-1. Requests for oral argument are seldom granted.

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ must be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ, and it must be in accordance with Rule R10-9-3, 4 CCR 801-1. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

CERTIFICATE OF MAILING

This is to certify that on the _____ day of May, 1998, I placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

Mr. Richard Navarro
2728 W. 39th Avenue
Denver, CO 80211

and to the respondent's representative in the interagency mail, addressed as follows:

Ms. Laurie Rottersman
Assistant Attorney General
1525 Sherman St., 5th Floor
Denver, CO 80203
